

FILED & ENTERED

MAR 19 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY  DEPUTY CLERK

OPINION NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

JE HYEON LEE,

Debtor.

Case No. 2:13-bk-10413 RK

Chapter 7

Adv. No. 2:13-ap-01420 RK

MI JIN SHIM,

Plaintiff,

vs.

JE HYEON LEE,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOLLOWING
TRIAL AND ORDER THEREON

The above-captioned adversary proceeding was tried before the undersigned United States Bankruptcy Judge on May 22, 2014 and on September 17, 2014. Frank E. Marchetti, of the Law Office of Frank E. Marchetti, and Chanho C. Joo, of the Law Offices of Chanho C. Joo, appeared for Plaintiff Mi Jin Shim (“Shim” or “Plaintiff”). Andrew E. Smyth, of the Smyth Law Office, appeared for Defendant Je Hyeon Lee (“Lee” or “Defendant”).

Having considered the testimony of the witnesses at trial and the evidence admitted at trial, the court makes the following findings of fact and conclusions of law in this adversary proceeding pursuant to Rule 7052 of the Federal Rules of Bankruptcy

1 Procedure. Any finding of fact that should be properly characterized as a conclusion of
2 law should be considered as such, and any conclusion of law that should be properly
3 characterized as a finding of fact should be considered as such.

4 FINDINGS OF FACT

- 5 1. Shim worked for Lee as an employee at his shipping business called 24 Quick
6 from May 2007 to May 2011, and she worked primarily at the Garden Grove office
7 of the business in Orange County. *Trial Testimony of Mi Jin Shim* (“*Shim Trial*
8 *Testimony*”), May 22, 2014 at 9:31 – 9:34 a.m.¹; *Transcript of Deposition of Je*
9 *Hyeon Lee* (“*Lee Deposition*”), September 18, 2013 at 95:13 - 98:7². Lee hired
10 Shim first as a clerk and then promoted her to be the manager of the Garden
11 Grove office. *Id.* The business helped customers ship goods to Korea through a
12 shipper called USAS. *Lee Deposition*, September 18, 2013 at 58:9-18, September
13 27, 2013 at 152:16 - 153:1.
- 14 2. In September 2010, Lee, who was Shim’s boss and supervisor and had worked
15 primarily at a different office in Los Angeles, began primarily working out of the
16 same office in Garden Grove as Shim. *Shim Trial Testimony*, May 22, 2014 at
17 9:34 – 9:37 a.m.
- 18 3. In late September or early October 2010, Lee asked Shim to go with him out of the
19 office for lunch and for business errands, which she did, and during some of these
20 trips outside the office, Lee proposed that that they go to a Korean-style spa
21 together, and Lee told Shim that he liked her. One time, Lee put his hand on
22 Shim’s hand while they were in his vehicle, but she told him not to do that and
23 withdrew her hand and turned her body away from him because she did not want
24 a personal relationship with him. *Trial Declaration of Mi Jin Shim* (“*Shim Trial*

25 ¹ Citations to the trial testimony of witnesses are to the date and time of the testimony reflected on the
26 court’s audio recording of the trial proceedings made using the FTR Gold audio recording program. Copies
of the audio recording files are available from the Clerk of Court.

27 ² Citations to the transcript of the deposition of Je Hyeon Lee are to page number and line number. The
28 transcript of Lee’s deposition was received into evidence at trial as his direct testimony.

- 1 *Declaration*”), ECF 41 at 2, ¶ 4; *Shim Trial Testimony*, May 22, 2014 at 9:37 – 9:38
2 a.m., 9:48 – 9:50 a.m. and 10:17 – 10:22 a.m.; *Trial Testimony of Je Hyeon Lee*
3 (*“Lee Trial Testimony”*), May 22, 2014 at 1:59 – 2:02 p.m. and 2:21 – 2:22 p.m.;
4 *Lee Deposition*, September 18, 2013 at 94:8-20, 99:13 - 100:25, 104:2 - 112:18,
5 121:23 - 122:19.
- 6 4. During Shim’s employment at 24 Quick, Lee frequently told Shim that he liked her
7 and wanted to date her, telling her that he wanted to be in a close relationship with
8 her. *Shim Trial Testimony*, May 22, 2014 at 9:37 – 9:38 a.m. and 11:01 – 11:03
9 a.m.; *Lee Deposition*, September 18, 2013 at 87:9 - 89:12 and 99:13-21, 104:2 -
10 110:11; *Lee Trial Testimony*, May 22, 2014 at 2:49 – 2:50 p.m. However, Shim
11 told Lee she did not like him. *Lee Trial Testimony*, May 22, 2014 at 2:09 – 2:10
12 p.m. Shim also told Lee she only wanted a business relationship with him and not
13 a personal relationship. *Lee Trial Testimony*, May 22, 2014 at 2:50 – 2:52 p.m.
- 14 5. Lee repeatedly asked to touch Shim and did touch her hand, face, shoulder, and
15 hair. On at least one occasion he tried to hug her from behind. Shim responded
16 to his efforts to touch her by telling him she did not like it and asking him to stop.
17 When Lee told Shim that he could not stop himself, she asked him to limit where
18 he touched her (i.e., shoulders or above). *Shim Trial Declaration* at 3, ¶ 8; *Shim*
19 *Trial Testimony*, May 22, 2014 at 10:12–10:14 a.m.; *Lee Trial Testimony*, May 22,
20 2014 at 2:19 - 2:20 p.m. and 2:49 – 2:54 p.m.; *Lee Deposition*, September 18,
21 2013 at 109:8 -117:5, 116:25 - 117:5, 121:23-122:2. Lee admitted during his
22 testimony at trial that Shim did not appear to enjoy this. *Lee Trial Testimony*, May
23 22, 2014 at 2:17 – 2:19 p.m.
- 24 6. On at least one occasion, Shim was seated at work, and Lee prevented her from
25 standing up. When Shim tried to leave, Lee grabbed her wrist tightly, which
26 bruised it. According to Shim, the stress that Shim was feeling at work due to
27 Lee’s advances caused her to develop an allergy around her eyes, gave her
28 indigestion and made her feel bad. Lee would harass Shim for long periods of

1 time, continually asking Shim to go out with him. Shim refused and told Lee that
2 she would quit, and Lee apologized, but continued to harass Shim. *Shim Trial*
3 *Declaration* at 4, ¶ 12; *Lee Deposition*, September 18, 2013 at 116:4-24.

4 7. During the time Shim was employed by Lee her husband was either not working or
5 working only part time and Shim was the only means of support for her family.
6 *Shim Trial Testimony*, May 22, 2014 at 10:15 a.m. Shim testified that her limited
7 English language ability would also make it difficult for her to find other work, and
8 the court finds that she is probably right. *Id.* at 10:14 a.m.; *see also, id.* at 9:37 –
9 9:42 a.m.

10 8. When Lee came to the Garden Grove location, sometimes he wore shorts to work.
11 On several occasions in November 2010 when Lee was wearing shorts, he sat at
12 his desk in the back room next to Shim's desk with his legs propped up so that he
13 exposed his genitals to her, and Shim was shocked, not knowing what to say or to
14 do, when he exposed himself to her. The first time this happened, she was
15 shocked, first disbelieving what she saw and then looking down to avoid looking at
16 Lee. Lee asked Shim why she was not looking at him, and she responded by
17 asking how could she do that, and he replied by asking her why he could not wear
18 shorts. On another occasion also in November 2010, Shim came into the back
19 room not expecting anyone there, but Lee was there in shorts with his legs
20 propped up with a hat covering himself. On this occasion, she screamed when he
21 exposed himself after removing his hat from his legs. Lee later admitted to Shim
22 that he had intentionally exposed himself to her because he wanted to be more
23 intimate with her. *Shim Trial Declaration* at 2-3, ¶¶ 5-7; *Shim Trial Testimony*, May
24 22, 2014 at 9:51 - 10:00 a.m.

25 9. In January 2011, Lee told Shim that he had a sexually explicit dream about himself
26 and Shim. Lee also told Shim that he wanted her to get a divorce and that he
27 wished that he could tell her husband everything for this to happen. In response,
28 Shim told Lee that she did not have any feelings for him and that he was just her

1 boss. Lee then told her that they were beyond an employer-employee relationship
2 because Shim saw Lee's private parts when he exposed himself to her. *Shim Trial*
3 *Declaration* at 3, ¶ 9; *Lee Deposition*, September 18, 2013 at 117:11 – 118.13,
4 119:12-15.

5 10. Shim still had lunch with Lee at work after he invited her to the Korean spa and
6 tried to hold her hand and after he exposed himself to her. *Shim Trial Testimony*,
7 May 22, 2014 at 10:26 – 10:29 a.m. and 11:23 – 11:28 a.m. Shim wanted to quit
8 her job due to Lee's advances, but she could not afford to lose the income from
9 her job and felt that she had to stay. *Shim Trial Testimony*, May 22, 2014 at 10:13
10 – 10:15 a.m. and 11:25 – 11:27 a.m. Shim testified that she was the main source
11 of support for her family, which included her parents who recently arrived from
12 Korea, her new baby and her husband who had reduced work hours. *Shim Trial*
13 *Testimony*, May 22, 2014 at 11:25 – 11:27 a.m. Lee was aware of Shim's need to
14 work, acknowledging in his deposition testimony that Shim often complained that
15 she was short on money and he knew that she needed the income she received at
16 24 Quick. *Lee Deposition*, September 18, 2013 at 101:10 - 102:19.

17 11. Lee eventually hired a part-time employee to work at the office because Shim
18 threatened to quit if he did not do so. When that employee was not in the office,
19 Lee would touch Shim more and hold her hand. *Shim Trial Declaration* at 4, ¶ 11.

20 12. Lee insisted that Shim join him on trips out of the office, which he said were work
21 related. When she later refused to go, he threatened to fire her co-worker whom
22 Shim knew needed the income, so Shim acquiesced and went with him on trips
23 out of the office. However, during these trips, they did not work and he wanted to
24 only drive around with her or go get foot massages with her. On at least one trip,
25 when Shim refused Lee he became upset and said he could take advantage of the
26 fact that Shim needed a paycheck. *Shim Trial Declaration* at 4-5, ¶¶ 16-17; *Lee*
27 *Deposition*, September 18, 2013 at 99:13 – 109:3. On one occasion, Shim, Lee,
28 and a coworker went to the Morongo Casino Resort and went shopping at the

1 nearby outlets. *Lee Deposition*, September 18, 2013, at 88:6 – 92:25; *Lee Trial*
2 *Testimony* at 2:55 – 2:57 p.m.

3 13. Shim quit her job with Lee at 24 Quick on May 13, 2011 because his sexual
4 advances took an emotional toll on her, particularly in the last six months before
5 she quit that he kept asking her every day why couldn't they have a personal
6 relationship. *Shim Trial Declaration* at 5, ¶¶18- 21; *Shim Trial Testimony*, May 22,
7 2014 at 10:55 – 11:03 a.m.

8 14. Shim had worked for Lee at 24 Quick on a full time basis (40 hours per week) at a
9 final rate of pay of \$12 an hour. *Shim Trial Declaration* at 5-6, ¶¶ 23-24; *Lee*
10 *Deposition*, September 18, 2013 at 10:16 – 13:17 and *Exhibit 2 attached thereto*;
11 *Shim Trial Testimony*, May 22, 2014 at 10:15 – 10:16 a.m.

12 15. In August 2011, Shim found new full time employment earning only \$8 an hour.
13 *Shim Trial Testimony*, May 22, 2014, 11:03 – 11:04 a.m. Shim testified that she
14 was not able to find replacement work until that time and that the work she found
15 did not pay as much. *Id.*

16 16. The court rejects Lee's arguments regarding Shim's credibility that she testified in
17 her deposition that she knew all the underlying facts supporting her cause of
18 action, but later admitted that she did not actually know such facts because it
19 relies on evidence not in the record in that there is no showing that the transcript of
20 her deposition was received into evidence at trial. *See Defendant's Response to*
21 *Plaintiff's Final Points and Authorities*, ECF 50 at 5:24-28 (no citation to admitted
22 evidence of Shim's deposition testimony).

23 17. Based on the above cited evidence, the court does not find that the social
24 relationship between Lee and Shim was consensual.

25 18. The court also finds that the evidence does not support Lee's claimed defenses to
26 defeat Shim's showing by a preponderance of the evidence of her claims for
27 sexual harassment and wrongful discharge that she was planning to steal his
28 client list and other proprietary information to set up a competing business, that

1 this justified him to fire her from her employment with him and that she is only
2 claiming sexual harassment after he found out about her intent to steal his
3 business. While Shim admitted that she had thoughts of starting an export
4 business similar to Lee's and had not discussed her claims of sexual harassment
5 with others before her discharge from employment by Lee, there is insufficient
6 evidence that she ever attempted to start a competing business, that she stole or
7 misappropriated any of Lee's client lists or other proprietary information or that the
8 complained of sexual harassment of Shim by Lee did not occur. *See Defendant's*
9 *Trial Brief*, ECF 40 at 2-3, 5; *Lee Deposition*, September 18, 2013 at 17:5-14,
10 37:12-13, 71:4-24; *Shim Trial Testimony*, May 22, 2014 at 11:25 to 11:28 a.m.
11 Such defenses are not supported by the evidence in this case generally as
12 described herein.

13 CONCLUSIONS OF LAW

14 Jurisdiction

- 15 1. Proceedings to determine the dischargeability of a particular debt are core
16 pursuant to 28 U.S.C. § 157(b)(2)(I).
- 17 2. Proceedings to determine claims against the bankruptcy estate are core pursuant
18 to 28 U.S.C. § 157(b)(2)(B).
- 19 3. In this adversary proceeding, Plaintiff's complaint is styled as one to determine the
20 dischargeability of a debt under 11 U.S.C. § 523(a), but the underlying debt, or
21 claim, that she is asserting in this case has not yet been liquidated. *See Amended*
22 *Complaint*, ECF 5, filed on April 29, 2013. Ordinarily, the bankruptcy court cannot
23 liquidate an unliquidated personal injury tort claim for the purpose of distribution in
24 a bankruptcy case, and such a claim must be tried by the federal district court. 28
25 U.S.C. § 157(b)(2)(B) and (O) and (b)(5); 1 March, Ahart and Shapiro, *California*
26 *Practice Guide: Bankruptcy*, ¶¶ 1:526 - 1:527.1 at 1-65 to 1-66 (2014).
- 27 4. Because 28 U.S.C. § 157(b)(5) is not jurisdictional, a party may effectively consent
28 to the bankruptcy court adjudicating a personal injury tort claim by failing to raise

1 an objection in that court and thus waive the restriction on bankruptcy court
2 adjudication under § 157(b)(5). *Stern v. Marshall*, 131 S.Ct. 2594, 2606-2608
3 (2011), *cited in*, 1 March, Ahart and Shapiro, *California Practice Guide:*
4 *Bankruptcy*, ¶¶ 1:527 - 1:527.1 at 1-66.

- 5 5. The court determines that the parties have effectively consented to it adjudicating
6 the matter of the liquidation of Plaintiff's claim or debt as part of the debt
7 dischargeability action, waiving any restriction under 28 U.S.C. § 157(b)(5),
8 because the case was fully tried before it and neither party raised any objection to
9 this court adjudicating the matter. *Id.*; *see also*, *In re Sasson*, 424 F.3d 864, 866-
10 875 (9th Cir. 2005) (holding bankruptcy court has subject matter jurisdiction to
11 enter a money judgment in adversary proceedings determining debt
12 dischargeability) (citations omitted); *see also*, *In re Smith*, 389 B.R. 902, 913-915
13 (Bankr. D. Nev. 2008) (discussing 28 U.S.C. § 157(b)(5) and *Sasson* and holding
14 that "a conclusion that 28 U.S.C. § 157(b)(5) is jurisdictional would effectively
15 destroy the bankruptcy court's ability to estimate or otherwise treat personal injury
16 claims" and that "*Sasson* thus stands for the proposition that this court has the
17 power to determine [defendant's] liability to [plaintiff] as well as the amount of any
18 damages [for personal injury tort claims].")

19 **Sexual Harassment**

- 20 6. The California Fair Employment Housing Act in California Government Code §
21 12940(j)(1) makes it an unlawful employment practice "for an employer. . .
22 because of sex. . . to harass an employee. . . ."
23 7. "The elements [of a prima facie claim of hostile-environment sexual harassment]
24 are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to
25 unwelcome sexual harassment; (3) the harassment complained of was based on
26 sex; (4) the harassment complained of was sufficiently pervasive so as to alter the
27 conditions of employment and create an abusive working environment; and (5)
28

1 respondeat superior.” *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d
2 590, 608 (1989) (citations and footnote omitted).

3 8. “Whether the sexual conduct complained of is sufficiently pervasive to create a
4 hostile or offensive work environment must be determined from the totality of the
5 circumstances.” *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d at 609.
6 “The factors that can be considered in evaluating the totality of the circumstances
7 are: (1) the nature of the unwelcome sexual acts or works (generally, physical
8 touching is more offensive than unwelcome verbal abuse); (2) the frequency of the
9 offensive encounters; (3) the total number of days over which all of the offensive
10 conduct occurs; and (4) the context in which the sexually harassing conduct
11 occurred.” *Id.*; see also, *Lyle v. Warner*, 38 Cal. 4th 264, 282-295 (2006)(sporadic
12 acts of harassment are not sufficient to establish a claim of hostile work
13 environment).

14 9. Shim testified at trial that during the nine months that they worked together in the
15 Garden Grove office of Lee’s business, Lee as her employer made sexual
16 advances to her as his employee, which was mostly in the form of unwanted
17 verbal advances through asking her to go on dates and to have a
18 boyfriend/girlfriend relationship constantly, but there was some unwanted physical
19 touching of her by Lee, though confined to face, hair and shoulders, that these
20 offensive sexual advances were frequent, that there was at least two incidents of
21 indecent exposure when Lee exposed his genitals to her, that this offensive
22 conduct occurred over a period of nine months and that this offensive conduct
23 occurred when Shim and Lee were alone together during her employment with
24 Lee. The court finds that this testimony was credible, that the totality of the
25 circumstances weigh in favor of a finding that Lee’s acts of harassment of Shim
26 during her employment were sufficiently pervasive and severe to create a hostile
27 or offensive work environment despite his claims to the contrary and that Shim has
28 demonstrated by a preponderance of the evidence that Lee unlawfully harassed

1 Shim in violation of California Government Code § 12940(j)(1). *See Defendant's*
2 *Trial Brief*, ECF 40 at 4-5. Specifically, the court finds that Shim has proven by a
3 preponderance of the evidence that she (1) is a member of a protected class (i.e.,
4 female gender); (2) was subjected to unwelcome sexual advances, constituting
5 sexual harassment by Lee; (3) the harassment was based on Shim's sex; (4) the
6 harassment was sufficiently pervasive so as to alter the conditions of employment
7 and create a hostile or offensive work environment, and (5) respondeat superior is
8 inapplicable because Lee was the employer and owner of the business which
9 employee Shim. Shim's trial testimony, which is credible, indicates that that the
10 harassment was sufficiently pervasive to constitute a hostile work environment
11 during the nine-month time period they worked in the same office in Garden Grove
12 between September 2010 and May 2011 because he kept asking her to go on
13 dates (i.e., to go to the Korean-style sauna/spa or foot massage parlors together
14 without their respective families and to go on trips out of town with him alone) and
15 to have a personal and/or sexual relationship, which she did not want, he kept
16 wanting to touch her body, and he did with her relenting only because he was her
17 boss and he agreed to physical limits (i.e., shoulders and above) and he knew and
18 understood that she did not like being touched by him, and he exposed himself to
19 her on several occasions.

20 10. Lee argues that his social relationship with Shim was consensual because she did
21 not say "no" to their "social excursions" (i.e., meals together, foot massages and
22 an outlet shopping trip). *See Defendant's Trial Brief* at 2, 5; *see also, Defendant's*
23 *Response to Plaintiff's Final Points and Authorities*, ECF 50 at 2:13-3:20. Lee's
24 belief that his social relationship with Shim was consensual was only a figment of
25 his imagination. As Lee acknowledges, Shim put strict limits on where they could
26 go together or he could touch her. Shim acquiesced in going out to lunch with Lee
27 during work hours since he was her boss, but there is no indication that she
28 accepted his invitations for dinner. Lee asked Shim to go with him to the Korean

1 spa, but there is no indication that she agreed to do that. Shim did go with Lee on
2 a shopping and casino trip to the Morongo Casino Resort, but she made sure that
3 a female coworker went along, so she and Lee would not be together alone. Lee
4 testified that Shim accepted his gift purchases during this trip, but this does not
5 indicate any consensual relationship as he remained her boss and she would have
6 had difficulty as his subordinate to refuse his gifts. Lee asked Shim to go on a trip
7 with him to Las Vegas, but there is no indication that she agreed to accept his
8 invitation.

9 11. The court rejects Lee's argument that a lack of Shim's complaints of sexual
10 harassment until she was fired, such as emails, texts, or testimony from a friend or
11 co-worker corroborating Shim's claims of sexual harassment proves that the
12 harassment did not occur or that Lee's advances did not upset Shim at the time.
13 *See Defendant's Response to Plaintiff's Final Points and Authorities*, ECF 50 at
14 2:5-13, *citing Shim Trial Testimony*, May 22, 2014 at 11:28 a.m. While the lack of
15 contemporaneous complaints may support an inference that the harassment did
16 not occur, the court determines that Shim's testimony describing Lee's behavior
17 was credible and adequately supports the inference that she as a victim of sexual
18 harassment in a vulnerable situation – being employed in a small business office
19 and needing her job to support her family – and therefore felt compelled to suffer
20 in silence.

21 12. The court rejects Lee's argument that Shim was "leading" him on. *See*
22 *Defendant's Response to Plaintiff's Final Points and Authorities*, ECF 50 at 3:7-21.
23 Shim may have brought up her marriage in her conversations with Lee, but
24 discussing personal relationships at work should not be viewed as an invitation to
25 sexual advances. Also, contrary to Defendant's arguments, Shim's agreement
26 that Lee could "touch her hair and face" was not a sign that Shim "had a lot of
27 power in this relationship" as he argues, but was a sign that Shim felt trapped by
28 her need for the job with Lee and was forced to resort to coping strategies such as

1 allowing him to touch her hair and face in order to prevent him from touching her
2 elsewhere.

3 13. The court rejects Lee's arguments that Shim was not emphatic enough in her
4 refusal of his sexual advances. *See Defendant's Response to Plaintiff's Final*
5 *Points and Authorities*, ECF 50 at 3:21-4:22. Lee argues that "if Ms. Shim had
6 never agreed to outings, if she had not said 'let's not go where my friends may see
7 me' but instead said 'I do not want to go on a social outing with you,' Mr. [Lee]
8 would have understood 'no' in fact meant 'no' here." As discussed above, Shim's
9 bargaining with Lee should not be viewed as consent, but as a sign that she felt
10 trapped by the situation and was forced to cope as best she could, and given the
11 situation, a firm "no" should not be required to convince Lee that his advances
12 were unwanted. Moreover, based on Lee's behavior towards Shim described
13 herein, the court is not convinced that even a firm "no" would have dissuaded Lee.

14 14. Thus, the court rejects Lee's argument that the social relationship he had with
15 Shim was consensual because it finds Shim's testimony that the relationship was
16 not consensual to be credible, i.e., the bizarre manifestations of their social
17 interactions (i.e., Lee's multiple indecent exposures to Shim, Lee's physical
18 touching of Shim, which he knew was unwanted, and Shim's refusal of his social
19 invitations generally and setting limits on their relationship to keep her job), and
20 the unequal economic relationship between the parties as employer-employee
21 poses a particular difficulty for Lee to show that this was a consensual relationship.
22 The fact that Shim still went to lunch with Lee at work after he invited her to the
23 Korean spa and exposed himself to her does not mean that the social relationship
24 was consensual. This is evidenced by Shim's credible testimony that she
25 continued to go to lunch with Lee because he was the boss and she needed the
26 job to support her family. The evidence indicates that the "social" relationship was
27 one-sided, initiated and controlled by Lee. In this regard, the court finds Shim's
28

1 testimony of harassment to be more credible than Lee's testimony of the absence
2 of harassment.

3 **Constructive Discharge in Violation of Public Policy**

4 15. "In order to establish a constructive discharge, an employee must plead and
5 prove, by the usual preponderance of the evidence standard, that the employer
6 either intentionally created or knowingly permitted working conditions that were so
7 intolerable or aggravated at the time of the employee's resignation that a
8 reasonable employer would realize that a reasonable person in the employee's
9 position would be compelled to resign." *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th
10 1238, 1251 (1994).

11 16. "Constructive discharge occurs when the employer's conduct effectively forces an
12 employee to resign. Although the employee may say, 'I quit,' the employment
13 relationship is actually severed involuntarily by the employer's acts, against the
14 employee's will. As a result, a constructive discharge is legally regarded as a
15 firing rather than a resignation." *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th at
16 1244–1245 (citation omitted).

17 17. "Whether conditions were so intolerable as to justify a reasonable employee's
18 decision to resign is normally a question of fact." *Valdez v. City of Los Angeles*,
19 231 Cal. App. 3d 1043, 1056 (1991) (citation omitted).

20 18. Based on the factual findings recited above, the court finds that Shim has proven
21 by a preponderance of the evidence that Lee's sexual harassment of her was
22 intolerable and justified her decision to resign.

23 19. Sexual harassment can form the basis for a cause of action for wrongful discharge
24 in violation of public policy. *Rojo v. Kliger*, 52 Cal. 3d 65, 91 (1990).

25 20. The court determines that based on the legal authorities cited above, Lee's sexual
26 harassment of Shim and Shim's subsequent resignation amounted to a
27 constructive and wrongful discharge in violation of public policy under California
28 law.

1 21. Although Shim did testify that she was considering starting an export business
2 similar to Lee's, the court rejects Lee's defense that he discharged Shim from her
3 employment with him for cause on grounds that she was attempting to steal his
4 client list and other proprietary information to start a competing business because
5 the preponderance of the evidence does not support such a defense (i.e., there
6 was no showing that she actually took his proprietary information or started a
7 competing business), and the court finds more credible Shim's testimony that she
8 quit because the Lee's sexual harassment became intolerable for her. See
9 *Defendant's Response to Plaintiff's Final Points and Authorities*, ECF 50 at 5:3-9;
10 *Shim Trial Declaration* at 5, ¶ 21; *Shim Trial Testimony*, May 22, 2014 at 11:01 –
11 11:03 a.m. and 11:31 -11:32 a.m.

12 Damages

13 22. "Every person who suffers detriment from the unlawful act or omission of another,
14 may recover from the person in fault a compensation therefor in money, which is
15 called damages." California Civil Code § 3281.

16 23. "The general rule is that the measure of recovery by a wrongfully discharged
17 employee is the amount of salary agreed upon for the period of service, less the
18 amount which the employer affirmatively proves the employee has earned or with
19 reasonable effort might have earned from other employment." *Parker v. Twentieth*
20 *Century-Fox Film Corp.*, 3 Cal. 3d 176, 181-182 (1970) (citations omitted).

21 24. "The general rule of damages in tort is that the injured party may recover for all
22 detriment caused whether it could have been anticipated or not. In accordance
23 with the general rule, it is settled in this state that mental suffering constitutes an
24 aggravation of damages when it naturally ensues from the act complained of, and
25 in this connection mental suffering includes nervousness, grief, anxiety, worry,
26 shock, humiliation and indignity as well as physical pain." *Crisci v. Security*
27 *Insurance Co. of New Haven, Connecticut*, 66 Cal. 2d 425, 433 (1967), *citing inter*
28 *alia*, California Civil Code § 3333; *see also*, *Capelouto v. Kaiser Foundation*

1 *Hospitals*, 7 Cal. 3d 889, 892-893 (1972) (the detriment [from pain and suffering] is
2 a genuine one that requires compensation, and the issue generally must be
3 resolved by ‘impartial conscience and judgment of jurors [or a judge] who may be
4 expected to act reasonably, intelligently and in harmony with the evidence.’”)
5 (citations omitted).

6 25. Based on the factual findings recited above, the court determines that Shim has
7 shown by a preponderance of the evidence that a reasonable person would be
8 disturbed by Lee’s conduct towards Shim and would endure mental suffering as a
9 result, as Shim credibly described in her trial testimony, including anxiety, worry,
10 shock, humiliation and indignity.

11 26. Based on the factual findings recited above, the court determines that Shim has
12 proven by a preponderance of the evidence that her economic damages from
13 Lee’s sexual harassment and wrongful discharge are compensable within the
14 meaning of California Civil Code § 3281 are as follows:

15 (a) Lost wages from unemployment for three months after wrongful discharge:

16 $12 \text{ weeks} \times 40 \text{ hours/week} \times \$12/\text{hour} = \$5,760.00$

17 (b) Lost wages from diminished earning capacity for two years after wrongful

18 discharge: $104 \text{ weeks} \times 40 \text{ hours/week} \times \$4/\text{hour} = \$16,640.00$.

19 The economic damages are based on Shim’s inability to find replacement work
20 from the time of wrongful discharge in May 2011 to the time she found and started
21 a new job in August 2011 and on the differential in pay between her prior job and
22 her new job after the wrongful discharge for two years (104 weeks). Computing
23 Shim’s economic damages for constructive discharge based on a time period of
24 104 weeks (or two years) as she requested is reasonable because Shim could
25 have reasonably expected to have continued her job for this time period in light of
26 her prior employment with Lee at 24 Quick for approximately four years from May
27 2007 through May 2011, and the evidence of her job search and new employment
28 shortly after the constructive discharge shows that she made reasonable efforts to

1 mitigate damages. *Parker v. Twentieth Century-Fox Corp.*, 3 Cal. 3d at 181-182
2 (citations omitted).

3 27. In determining damages for mental distress, the court finds instructive the
4 discussion of that topic by the Supreme Court of California in *Capelouto v. Kaiser*
5 *Foundation Hospitals*: “If a cause of action is otherwise established, it is settled
6 that damages may be given for mental suffering naturally ensuing from the acts
7 complained of.’ In general, courts have not attempted to draw distinctions between
8 the elements of ‘pain’ on the one hand, and ‘suffering’ on the other; rather, the
9 unitary concept of ‘pain and suffering’ has served as a convenient label under
10 which a plaintiff may recover not only for physical pain but for fright, nervousness,
11 grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment,
12 apprehension, terror or ordeal. Admittedly these terms refer to subjective states,
13 representing a detriment which can be translated into monetary loss only with
14 great difficulty. But the detriment, nevertheless, is a genuine one that requires
15 compensation and the issue generally must be resolved by the ‘impartial
16 conscience and judgment of jurors who may be expected to act reasonably,
17 intelligently and in harmony with the evidence.’ Indeed, mental suffering frequently
18 constitutes the principal element of tort damages; awards which fail to compensate
19 for pain and suffering have been held inadequate as a matter of law.” *Capelouto*
20 *v. Kaiser Foundation Hospitals*, 7 Cal. 3d at 892-893 (citations and footnote
21 omitted).

22 28. Here, the court finds that Shim likely suffered many of the subjective states
23 described in *Capeluoto*. The court considers the nervousness and anxiety that
24 Shim experienced as she went to work each day for Lee at 24 Quick, the shock
25 she felt when Lee exposed himself or described his lewd fantasies, and the
26 indignity she suffered as she was reduced to bargaining with Lee about where on
27 her body he could touch her.

1 29. Based on the factual findings recited above, the court determines that Shim has
2 proven by a preponderance of the evidence that her non-economic damages are
3 compensable within the meaning of California Civil Code § 3281 as follows:

4 Past Mental Suffering/Distress/Anxiety: \$50,000.00.

5 In calculating this amount, the court finds credible Shim's testimony that Lee's
6 actions during her employment caused her mental suffering, distress and anxiety
7 in the past. Lee does not dispute that his behavior caused Shim to suffer distress.
8 *See Defendant's Response to Plaintiff's Final Points and Authorities*, ECF 50 at
9 5:17-18 ("Ms. Shim testified that Mr. Lee's behavior caused her distress at times.
10 Defendant is not contesting that."). However, Lee argues that that Shim is not
11 entitled to damages for the emotional distress that he caused her because there is
12 insufficient evidence in the record support such an award. *Id.* at 5:18-23
13 ("However, there is not enough evidence in the record for this Court to correctly
14 assess the length or severity of that distress. No expert testimony was offered.
15 Although Ms. Shim made a good impression as a nice person, there is no
16 guarantee that her descriptions of emotional distress were not exaggerated
17 because she is in an active litigation. How is this Court to determine if one money
18 award, or another one 10 times larger, is the proper compensation for any distress
19 she suffered?"). In this regard, the court finds that the discussion of awarding
20 compensatory damages for such harm in *Duarte v. Zachariah*, 22 Cal. App. 4th
21 1652 (1994) is instructive: "Compensatory damages may be awarded for bodily
22 harm without proof of pecuniary loss. The fact that there is no market price
23 calculus available to measure the amount of appropriate compensation does not
24 render such a tortious injury noncompensable. 'For harm to body, feelings or
25 reputation, compensatory damages reasonably proportioned to the intensity and
26 duration of the harm can be awarded without proof of amount other than evidence
27 of the nature of the harm. There is no direct correspondence between money and
28 harm to the body, feelings or reputation. There is no market price for a scar or for

1 loss of hearing since the damages are not measured by the amount for which one
2 would be willing to suffer the harm. The discretion of the judge or jury determines
3 the amount of the recovery, the only standard being such an amount a reasonable
4 person would estimate as fair compensation.” 22 Cal. App. 4th at 1664-1665,
5 *citing inter alia, Restatement (Second) of Torts*, §§ 905 and 912. Guided by these
6 principles, the court as the trier of fact in this proceeding determines that Shim is
7 entitled to recover the amount of \$50,000 as fair compensation for the emotional
8 toll, or mental suffering, she endured caused by Lee from his acts of sexual
9 harassment and wrongful discharge.

10 30. However, the court determines that Shim has not proven her claims for
11 compensatory damages for past and future mental suffering, distress and anxiety
12 beyond what the court awards here because such claims have not been proven by
13 a preponderance of the evidence. As the court stated in *Bellman v. San Francisco*
14 *High School District*, 11 Cal. 2d 576 (1938), “[t]o entitle a plaintiff to recover
15 present damages for apprehended future consequences, there must be evidence
16 to show a degree of probability of their occurring as amounts to a reasonable
17 certainty that they will result from the original injury.” 11 Cal. 2d at 588 (citation
18 omitted). Based on this evidentiary record, particularly in the absence of expert
19 medical testimony regarding Shim’s mental health to substantiate her claims for
20 future mental suffering, the court is unable to find that she proved such claims
21 under this standard.

22 31. In this regard, Shim understood that Lee had emotional problems as she
23 acknowledged in her trial declaration. *Shim Trial Declaration* at 3-5, ¶¶ 8-20. For
24 example, Shim stated in paragraph 8 of her declaration: “In December of 2010, Mr.
25 Lee told me that he had a mental disease which makes him lose control of his
26 emotion. His disease got worse and worse. He said he wants to go to Korea in
27 order to seek treatment for this mental disease/condition. He hugged me from
28 behind, held my hand and touched my cheek. He would also constantly stare at

1 me and would stand beside me while I worked. This happened almost every day.
2 From then on I said I wouldn't work outside with him and that I didn't want to go
3 out for lunch with him." *Id.* at 3, ¶ 8. Whatever the cause of Lee's antisocial
4 behavior towards Shim and his delusional thoughts about their social relationship,
5 his behavior took an emotional toll on her, causing her mental suffering. For the
6 most part, Lee abided by the behavioral limits set by Shim, who was able to
7 minimize to some extent his offensive conduct. However, this does not mean that
8 the emotional abuse and harassment Shim suffered was consensual in any way.
9 Shim needed her job to support her family and tolerated Lee's unwanted advances
10 until the situation became unbearable. The harassment was more in the nature of
11 constant pestering from Lee arising out of his emotional problems wanting a
12 personal and/or sexual relationship with Shim that she had to endure in order to
13 keep her job, which she needed to support her family. Based on the evidence
14 before the court, the harassment was real and appreciable, though it ended when
15 Shim left her employment with Lee. Thus, in the court's view, Shim is entitled to
16 an award of damages for the mental suffering she endured during her employment
17 with Lee.

18 **Nondischargeability of Debt**

19 32. 11 U.S.C. § 523(a)(6) provides, "(a) A discharge under ... this title does not
20 discharge an individual debtor from any debt.... (6) for willful and malicious injury
21 by the debtor to another entity or to the property of another entity." "Willful" and
22 "malicious" are both required elements to establish non-dischargeability under 11
23 U.S.C. § 523(a)(6). *Ormsby v. First American Title Co. of Nevada (Matter of*
24 *Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010).

25 33. For purposes of 11 U.S.C. § 523(a)(6), "willful" means "deliberate" or "intentional."
26 *Kawaauhau v. Geiger*, 523 U.S. 57, 61 and n. 3 (9th Cir.1998).

27 34. The "willful injury" requirement is met when the creditor shows that: the debtor had
28 a *subjective motive* to inflict the injury; or the debtor believed the injury was

1 *substantially certain* to occur as a result of his or her conduct. *Petralia v. Jercich*
2 (*In re Jercich*), 238 F.3d 1202, 1208 (9th Cir. 2001); *Carrillo v. Su (In re Su)*, 290
3 F.3d 1140, 1144 (9th Cir. 2002).

4 35. A “malicious injury” under 11 U.S.C. § 523(a)(6) involves a wrongful act, done
5 intentionally, that necessarily causes injury that is committed without just cause or
6 excuse. *In re Jercich*, 238 F.3d at 1209; *Thiara v. Spycher Brothers (In re Thiara)*,
7 285 B.R. 420, 433 (9th Cir. BAP 2002).

8 36. Debts based on claims for sexual harassment and discrimination have been
9 determined to be non-dischargeable based on a showing of injury that is both
10 willful and malicious under 11 U.S.C. § 523(a)(6). See, e.g., *Jones v. Svreck (In re*
11 *Jones)*, 300 B.R. 133, 139-141 (1st Cir. BAP 2003); *Basile v. Spagnola (In re*
12 *Spagnola)*, 473 B.R. 518, 522-525 (S.D.N.Y. 2012); *McDonough v. Smith (In re*
13 *Smith)*, 270 B.R. 544, 549-550 (Bankr. D. Mass. 2001); *Thompson v. Kelly (In re*
14 *Kelly)*, 238 B.R. 156, 160-162 (Bankr. E.D. Mo. 1999).

15 37. Based on the factual findings recited above, the court determines that Shim’s
16 actions shown to constitute sexual harassment were willful because he knew that
17 his verbal and physical acts of harassment of his employee, Shim, were
18 unwelcome and harmful as: (1) Lee constantly asked Shim to go on trips out of the
19 office for nonwork purposes and badgered her to have a “boyfriend/girlfriend”
20 relationship, knowing she was not interested in anything other than a professional
21 relationship with him (e.g. *Shim Trial Testimony*, May 22, 2014 at 11:02 a.m.
22 (describing the six months leading up to Shim’s quitting, where Lee would ask
23 Shim the same questions everyday about why they could “not have a relationship
24 like that [boyfriend/girlfriend]”)); (2) Lee physically touched Shim’s face, hands and
25 shoulders, knowing that she did not want him to touch her and that she did not
26 enjoy his touching of her, and knowing that his touching of her and his advances
27 upon her were unwanted; (3) Lee coerced Shim into going outside with him by
28 threatening to fire her co-workers, which evidences his subjective knowledge that

1 his advances were unwelcome (*Shim Trial Declaration*, ECF 41 at 4 ¶ 16); and (4)
2 he purposely exposed his private parts to her on several occasions, and these
3 circumstances indicate that Lee was aware of the injury these acts were causing
4 her in physical and mental distress and/or substantially certain that such injury
5 would occur.

6 38. The court rejects Lee's arguments that 11 U.S.C. §523(a)(6) does not apply
7 because he had strong affection for Shim and did not intend to cause her distress.
8 *Defendant's Response to Plaintiff's Final Points and Authorities*, ECF 50 at 4:24-
9 26 ("Mr. Lee had a strong affection if not love for Ms. Shim. It is unlikely that his
10 goal was to cause her distress."). In support of this argument, Lee argues, "To
11 obtain a judgment under 11 USC 523(a)(6) the Plaintiff is required to prove the
12 mental elements of 'willful and malicious(ness)' A 'willful and malicious injury'
13 under Section 523(a)(6) means the Debtor intended 'the consequences of an act,'
14 not simply 'the act itself'. " *Id.* at 4:24 – 5:2, *citing inter alia, In re Howell*, 373 B.R.
15 1, 3 (Bankr. W.D. Ky. 2007). The case cited by Lee, *Howell*, in turn quotes
16 *Kawaauhau v. Geiger*, 523 U.S. at 61-62, which stated: "The word 'willful' in (a)(6)
17 modifies the word 'injury,' indicating that nondischargeability takes a deliberate or
18 intentional injury, not merely a deliberate or intentional act that leads to injury.
19 Had Congress meant to exempt debts resulting from unintentionally inflicted
20 injuries, it might have described instead 'willful acts that cause injury.' Or,
21 Congress might have selected an additional word or words, i.e., 'reckless' or
22 'negligent,' to modify 'injury.' Moreover, as the Eighth Circuit observed, the (a)(6)
23 formulation triggers in the lawyer's mind the category 'intentional torts,' as
24 distinguished from negligent or reckless torts. Intentional torts generally require
25 that the actor intend 'the consequences of an act,' not simply 'the act itself.'"
26 *In re Howell*, 373 B.R. at 4, *quoting, Kawaauhau v. Geiger*, 523 U.S. at 61-62.
27 The court's findings stated above regarding Lee's willfulness is consistent with the
28 holding in *Kawaauhau* and the Ninth Circuit precedent following it in *Jercich* and

1 Su. Lee's actual knowledge which is the focus of the willfulness inquiry under 11
2 U.S.C. § 523(a)(6) may be proven with circumstantial evidence. *In re Thiara*, 285
3 B.R. at 432-433. Circumstantial evidence of Lee's subjective knowledge that his
4 conduct would cause distress is shown by his persistently asking Shim out for
5 social outings and for a relationship beyond one for work when he knows that
6 these are unwanted and unwelcome, frequently touching her person when he
7 knows she did not like it and did not want him to and intentionally exposing himself
8 to her at the workplace in an employer-employee relationship.

9 39. This analysis is consistent with the post-*Kawaauhau v. Geiger* case law holding
10 that a debt based on a claim of sexual harassment is excepted from discharge as
11 based on willful and malicious injury under 11 U.S.C. § 523(a)(6). *In re Jones*, 300
12 B.R. at 139-141; *In re Spagnola*, 473 B.R. at 522-524; *In re Smith*, 270 B.R. at
13 549; *In re Kelly*, 238 B.R. at 160-161.

14 40. The court determines that Shim's actions, shown to constitute sexual harassment,
15 were malicious because the actions were wrongful necessarily producing harm
16 and without just cause or excuse. As described above, Lee made sexual
17 advances towards Shim, his employee, while at work, knowing that the advances
18 were unwanted, and there was no justification or excuse for his actions when she
19 said she did not want a personal relationship with him, she did not want to go out
20 with him, she did not want him to touch her and she did not enjoy him touching
21 her.

22 41. As discussed above, the court has determined that Shim has established that Lee
23 is indebted to her based on her claims for sexual harassment and wrongful
24 termination against him, and the court now determines that this debt is not
25 excepted from discharge under 11 U.S.C. § 523(a)(6) because the preponderance
26 of the evidence recited herein shows that the debt resulted from willful and
27 malicious injury caused by Lee's wrongful acts.
28

1 42. The court makes no findings of fact and conclusions of law at this time as to the
2 appropriateness of punitive damages or attorneys' fees, which must be sought by
3 separate motion.

4 The court further orders counsel for Shim to submit a proposed judgment consistent
5 with these findings of fact and conclusions of law within 30 days of the date of entry.

6 IT IS SO ORDERED.

7 ###
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

24 Date: March 19, 2015



Robert Kwan
United States Bankruptcy Judge